

ETHICS IN CITY GOVERNMENT

A Presentation to the

Department Directors, Deputy Directors,
Assistant Directors, Deputy Assistant Directors,
Senior Staff, Mayor's Executive Staff, and
Members of
City Boards and Commissions

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by the

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ETHICS IN CITY GOVERNMENT

Ethics – a set of principles of right or good behavior; a theory or a system of moral values; the rules or standards of a person or the members of a profession.

Webster's II New College Dictionary (1999)

The following is an outline of ethics provisions found in the City Charter, Code of Ordinances, City administrative rules, and related state laws. The reader should become familiar with these various provisions. This outline is intended for use by Department Directors, Deputy Directors, other senior personnel, and the Chairs (or Executive Directors, if applicable) and members of City Boards and Commissions. This outline is only intended to provide general guidance regarding situations in which ethical issues may arise. Situations that actually arise tend to be fact intensive, and specific legal counsel should be sought as may be appropriate.

The City Charter and Code of Ordinances may be accessed online at www.houstontx.gov. City administrative rules, including Executive Orders and Administrative Procedures promulgated by the Mayor are available on the City's intranet at www.choice.net. While it is recommended that you consult the Legal Department in connection with any ethics issue or matter, the state statutes referenced in this outline are available online at www.capitol.state.tx.us/statutes/statutes.html.

STATE LAWS RELATING TO ETHICS

I. Chapter 36, Texas Penal Code (Bribery & Corrupt Influence)

This Chapter addresses a number of subjects, including bribery. However, gifts and honoraria are subjects that most frequently raise inquiries. Chapter 36 extends to public servants **and to any other person in whose welfare the beneficiary has a direct and substantial interest** and has been held to include a spouse and a child.

Public Servant

The term “**public servant**,” as used in the Penal Code, means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he or she has not yet qualified for office or assumed his or her duties:

- (A) An officer, employee, or agent of government;
- (B) A juror or grand juror;

- (C) An arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
- (D) An attorney at law or notary public when participating in the performance of a governmental function;
- (E) A candidate for nomination or election to public office; or
- (F) A person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

Honoraria

Section 36.07 prohibits public servants from accepting an honorarium for services associated with their being public servants (speaking engagements, etc.). The Attorney General has ruled that a plaque may be accepted, but nothing with intrinsic value such as a crystal bowl or clock. There is an exception for transportation, food, and lodging when a service is rendered such as addressing an audience.

Gifts to Public Servant - In General

Section 36.08 prohibits a public servant from soliciting or accepting gifts from persons over whom the public servant has business, official, regulatory, or jurisdictional authority. Section 36.09 makes it an offense to offer gifts to a public servant. An offense under either section is a Class A misdemeanor.

Gifts to Public Servant - Exceptions

Section 36.10 sets out limited exceptions, including gifts from relatives, non-monetary gifts of less than \$50, campaign contributions, and food, transportation, lodging, or entertainment accepted as a guest.

Advisory Opinions

The Texas Ethics Commission is authorized to issue advisory opinions regarding Chapter 36 upon which public servants may rely, and action taken by a public servant in reliance on an opinion from that agency is a defense to prosecution. Staff attorneys of the Commission are available by telephone at 1-800-325-8506.

II. Chapter 37, Texas Penal Code

Government Records

Chapter 37 of the Texas Penal Code is titled “Perjury and Other Falsification” and is included because it deals with certain offenses relating to a “government record,” which is defined in Section 37.01(2) to mean:

- (A) Anything belonging to, received by, or kept by government for information, including a court record;
- (B) Anything required by law to be kept by others for information of government;
- (C) A license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States;
- (D) A standard proof of motor vehicle liability insurance form described by Section 601.081, Transportation Code, a certificate of an insurance company described by Section 601.083 of that code, a document purporting to be such a form or certificate that is not issued by an insurer authorized to write motor vehicle liability insurance in this state, an electronic submission in a form described by Section 502.153(i), Transportation Code, or an evidence of financial responsibility described by Section 601.053 of that code; or
- (E) An official ballot or other election record.

Making and Preserving Government Records

Section 37.10, Tampering with Governmental Record, declares in subsection (a) that a person commits a penal offense if he or she:

- (1) Knowingly makes a false entry in, or false alteration of, a governmental record;
- (2) Makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;
- (3) Intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;
- (4) Possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully;

(5) Makes, presents, or uses a governmental record with knowledge of its falsity; or

(6) Possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.

Type of Offense; Punishment

Except for those actions described in items (a)(2) and (a)(3), an offense under Section 37.10 is a ***Class A misdemeanor***, punishable by a \$4000 fine, confinement in jail for a year or both, unless the person's intent is to defraud or harm another, in which event the offense is a state jail felony.

An offense under this section is a ***felony of the third degree*** (imprisonment of 2 to 10 years plus a fine not to exceed \$10,000) if it is shown at trial that ***the government record was a license, certificate, permit, seal, title, letter of patent, or similar document issued by government***, unless the actor's ***intent is to defraud or harm another***, in which event the offense is a ***felony of the second degree*** (imprisonment for 2 to 20 years plus a fine not to exceed \$10,000).

Destruction or Transfer of Government Records

The destruction or transfer of a government record under the authority of Section 441.204 of the Texas Government Code is an exception to the application of this section of the Penal Code and is lawful. Chapter 441 is discussed in further detail in section V below.

Affirmative Defenses

It is also an ***affirmative defense to prosecution for possession under item (6) above***, that the possession occurred in the actual discharge of official duties as a public servant. Also, it is a ***defense to prosecution under subsections (a)(1), (a)(2) or (a)(5)*** that the false entry or false information could have no effect on the government's purpose for requiring the government record.

Impersonating Public Servant

Finally, a person commits an offense under Section 37.11, *Impersonating Public Servant*, if he or she:

(1) Impersonates a public servant with intent to induce another to submit to his or her pretended official authority or to rely on his or her pretended official acts; or

(2) Knowingly purports to exercise any function of a public servant or of a public office, including that of a judge and court, and the position or office through which he or she purports to exercise a function of a public servant or public office has no lawful existence under the constitution or laws of this state or of the United States.

An offense under this section is a felony of the third degree.

III. Chapter 145, Texas Local Government Code

In 2003, the 78th Texas Legislature amended the Local Government Code by adding a new Chapter 145, which requires a “municipal officer” to file a personal financial disclosure statement with the City Secretary on or before April 30th of each calendar year. Although passed in 2003, the law did not become effective until January 1, 2005, and the initial reports required were due no later than April 30 of that year.

This statute defines “municipal officer” as the mayor, a member of the governing body, the municipal attorney, or the city manager of a municipality. Sec. 145.002. As applied to Houston, only the Mayor, members of the City Council, and the City Attorney are required to file this disclosure statement. The City Controller, not being a member of the governing body or otherwise covered by the aforementioned definition, is not included within the statute.

The personal financial statement must disclose the municipal officer’s required financial information for the preceding calendar year.

IV. Chapter 171, Texas Local Government Code

This Chapter prohibits “local public officials” from taking part in a debate, vote, or decision in which they have a substantial interest. The term “local public official” means “a member of the governing body or another **officer**, whether elected, appointed, paid, or unpaid, of any . . . municipality, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.”

The substantial interest at issue under this statute may arise through ownership of equity in a business entity (10% or \$15,000 fair market value), receipt of salary or other compensation from a business entity (10% or more), or ownership of an interest in real property (\$2500). This provision extends not only to interests held by the local public official, **but also to interests held by his or her spouse and their close relatives, within the first degree of consanguinity or affinity (blood or marriage)**. Chapter 171 is cumulative of the Charter, meaning that both apply. Therefore, compliance with Chapter 171 neither excuses compliance with the Charter nor allows the City to do business with firms in which a Council Member has a direct or indirect pecuniary interest.

Where Chapter 171 is applicable, the public official must file an affidavit with the City Secretary before the vote or action is taken and may not participate in the vote, action, or debate on the matter. Chapter 171 does not prohibit uncompensated service on the board of a private, nonprofit corporation. However, its operation can be triggered by the compensated service of the public official or a covered relative.

V. Chapter 176, Texas Local Government Code

The 79th Texas Legislature amended the Local Government Code in 2005 by adding a new Chapter 176. This law requires a “local government officer” to file a disclosure form with the City Secretary if the officer or certain members of the officer’s family (parents, children, spouse, in-laws), have either of the following relationships with respect to a person who has contracted, or seeks to contract, with the City:

1. Has an employment or other business relationship with that person that results in the officer or family member receiving taxable income; or
2. Has received one or more gifts from that person, other than gifts of food, lodging, transportation or entertainment accepted as a guest, that have an aggregate value of more than \$250 in the 12-month period preceding the date the officer becomes aware that:
 - (A) A contract between the City and the person has been executed; or
 - (B) The City is considering doing business with the person.

In Chapter 176:

“Local government officer” means a member of the governing body of a local government entity or a director, superintendent, administrator, president or other person designated as the executive officer of the local government entity; and

“Local government entity” means the City or a local government corporation, board, commission, district or authority to which a member has been appointed by the Mayor or the City Council. Organizations such as the Texas Municipal League are excluded from this definition.

The state and its political subdivisions, the federal government and foreign governments are **excluded** from the requirements of Chapter 176. County governments, school districts, junior college districts ARE included within its provisions, however.

Chapter 176 applies to a person who contracts or seeks to contract for the sale or purchase of property, goods, or services with a local government entity or an agent of such person. ***There is no minimum contract amount under this statute!***

The disclosure form to be filed by a local government officer is prescribed by the Texas Ethics Commission and may be downloaded at www.ethics.state.tx.us.

A disclosure statement must be filed not later than 5 p.m. on the 7th day after the date the officer becomes aware of the facts that require the filing of the statement. Failure to file the required disclosure statement is a Class C misdemeanor. The statement must be made under oath ***under penalty of perjury (a Class A misdemeanor, punishable by a fine not to exceed \$4,000, one year in jail, or both).***

Chapter 176 also imposes an obligation to file a disclosure form on those persons who do business or seek to do business with the City.

VI. Chapter 573, Texas Government Code (Nepotism)

Chapter 573 prohibits nepotism. “***Nepotism***” is defined as “Bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship to appointing authority.” Black’s Law Dictionary, 6th Ed., 1991.

A public official may not appoint, hire or promote a person who is related within the third degree of consanguinity or the second degree of affinity. Chapter 573 does not generally affect the hiring or retention of employees who are related to Council Members because most hirings and promotions in City government do not require action by Council Members. A chart showing the degrees of relationship by consanguinity and affinity for purposes of applying the state nepotism law is attached to this outline for reference.

VII. Chapter 255, Texas Election Code

Chapter 255 of the Texas Election Code makes it a Class A misdemeanor for an officer or employee of the City to spend or authorize the expenditure of public funds for political advertising, which is defined as including many communications supporting or opposing a candidate or a proposition on a ballot. Expenditure has been interpreted to include the use of City resources such as staff, fax machines, computers, and mail distribution.

VIII. Chapter 441, Texas Government Code

Subchapter J sets out requirements for the preservation, retention, and management of local government records. Section 2-111 of the Houston Code of Ordinances is loosely modeled on this subchapter. Procedures are in place to process and control the destruction of City records, and employees charged with

such duties should ensure that any such action is taken in full compliance with those regulations.

IX. Chapter 551, Texas Government Code (Texas Open Meetings Act)

The Texas Open Meetings Act (“TOMA”) provides that meetings of governmental bodies must be open to the public, except for expressly authorized executive sessions (which are prohibited by the City Charter) and that the public must be given 72 hours’ notice of the time, place and subject matter of meetings of governmental bodies. Actions taken by a governmental body in violation of the Act are **voidable**. The Act provides for a civil action to prevent a violation of the Act, or to require compliance with the Act.

Certain violations of the Act are ***punishable by criminal enforcement***. A member of the governmental body commits an offense if the member or group knowingly conspires to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations.

Training Required (New)

In 2005, the Texas Legislature amended the TOMA to require that “each appointed or elected public official who is a member of a governmental body subject to this chapter” complete a course of training of not less than one hour nor more than two hours regarding the responsibilities of the governmental body and its members under that law. The required training must be completed not later than the 90th day after the date the member:

- (1) Takes the oath of office, if the member is required to take an oath of office to assume the person’s duties as a member of the governmental body; or
- (2) Otherwise assumes responsibilities as a member of the governmental body, if the member is not required to take an oath of office to assume the person’s duties as a member of the governmental body.

Persons Affected

The Mayor and members of City Council, as well as members of various City boards and commissions which are “subject to this chapter” (TOMA) are required to complete this training and confirm their completion of such training by completing a certificate of course completion form and filing the form with the City Secretary, as required by Section 551.005 of the TOMA.

Training Materials; Certificate of Completion

The Legal Department has obtained the training material promulgated by the Texas Attorney General's Office and will endeavor to make it available to the proper officials. Upon completion of the training, each person must go to the Attorney General's website (www.oag.state.tx.us/) and follow these steps:

1. Click "Open Government Training" on the right side of the screen.
2. Click "Print course completion certificate."
3. Follow instructions to complete the certificate.
4. Print course completion certificate.
5. File course completion certificate with City Secretary.

It is recommended that each person retain a copy of the certificate in his or her files. A sample copy of the course completion certificate is attached.

X. Chapter 552, Texas Government Code (Texas Public Information Act)

The Texas Public Information Act ("TPIA," formerly, Texas Open Records Act) gives the public the right to request and look at government information. Although the Act makes most government information available to the public, a number of exceptions exist. ***Requests to review or copy information must be complied with by the City within 10 business days.***

Public records encompass documents in any form and include calendars, phone records, and emails. The Texas Attorney General makes the final determination whether information is subject to an exception. Violations of the TPIA carry civil and criminal penalties. A public official commits an offense if, with criminal negligence, the official refuses a requestor access to, or copying of, public information as provided by the TPIA.

The local government body may be subject to a civil suit to compel the release of requested information. Public officials have the duty to see that public records are protected from deterioration, alteration, mutilation, loss, or unlawful removal. Public records may be destroyed only pursuant to statutory authority.

Training Required (New)

As in the case of the TOMA, the TPIA was also amended by the Legislature in 2005 to add a "training requirement."

Persons Affected

New Section 552.0012 of the TPIA mandates that "public officials" covered by the TPIA, as well as the "officer for public information of a governmental body," without

regard to whether such person is appointed or elected, shall complete the training within the same time period as the TOMA training.

Unlike the TOMA requirement, however, the covered public official **may** designate a public information coordinator to satisfy the training requirements of Section 552.012 for the public official.

Training Materials; Certificate of Completion

As in the case of the TOMA training requirements, the Legal Department has obtained the training materials promulgated by the Attorney General and will endeavor to make it available to those who must complete the training requirement.

The procedure for obtaining and filing the course completion certificate, set out above under the TOMA training discussion, should be followed to ensure full compliance with the required TPIA training requirement. A sample copy of the course completion certificate is attached.

LOCAL ETHICAL PROVISIONS

I. City Charter Provisions

The City Charter prohibits certain conduct by “officers” of the City which term has been defined by Texas common law (case law) to mean a “public officer.” **Public officers** are distinguished from public employees as **having the authority to perform sovereign functions of the government “largely independent of the control of others.”** *Aldine I.S.D. v. Standley*, 154 Tex. 547, 280 S.W.2d 578, 583 (1955). Department heads and, possibly, some of their subordinates may be deemed to be **officers** of the City in certain circumstances. Listed below are examples of conduct which City officers should avoid:

- City officers and employees may not hold employment while in arrears to the City for taxes or other obligations. (Art. III, § 2)
- City officers may not divert funds from the sinking fund earmarked to retire public improvement bonds. Any such conduct is deemed a **felony**. (Art. IV, § 1)
- An **officer** of the City may not have a direct or indirect interest in a City contract, City work, “or in any matter wherein the rights or liabilities of the City of Houston are or may be involved.” (Art. VII, § 4)

II. City Code of Ordinances

A. Chapter 14 (Civil Service)

City Employee as Candidate for Elective Office

Employees should notify the Director of Human Resources in writing when they become a candidate for elective office. (Houston City Code § 14-156) Although not specifically addressed in the City Code, this rule involves two considerations that may raise conflicts with City employment:

- The federal Hatch Act imposes restrictions on the partisan political activities of employees whose jobs are funded in whole or in part with federal funds.
- In certain instances, department heads and some other City personnel **may** be deemed to be “officers” under Texas law. Virtually all elected office holders are also “officers,” as that term is used in the Texas Constitution. The Texas Constitution and common law prohibit the simultaneous holding of two public offices in many circumstances.

Hiring and Promotion of Employees

Department heads have personal responsibility for the hiring and promotion of employees within their departments. This includes Civil Service employees. (Houston City Code Ch. 14, Rules 8 & 10) In the capacity of certifying employees for hiring and promotion, department heads are subject to state nepotism laws, which are discussed above. Directors and other supervisory personnel should ensure that they are familiar with the Administrative Procedure No. 3-5, relating to the hiring of persons for Key Executive Management Positions, Pay Grade 30 and above, and the Mayor’s Policy on Hiring Relatives (Policy No. 104). Both are available online via C.H.O.I.C.E.net. www.choice.net.

Prohibited Conduct

Under Sec. 14-183, each City employee is subject to discipline for a wide range of violations of an ethical nature including:

- Accepting gifts given with the intent to influence.
- Accepting gifts for doing one’s duty.
- Engaging in outside business activities that might tend to impair independent judgment.
- Holding investments that conflict with the public trust.
- Disclosing certain confidential information or the use of confidential information for personal benefit.

- Using one's City position to secure any benefit.
- Negotiating for or accepting future employment where a conflict exists with City duties.
- Representing persons before City agencies, except in civic affairs.
- Representing any person in civil litigation against the City or in a Municipal Court case.

Similar provisions are contained in Chapter 18, which apply to department heads and executive level personnel and members of boards and commissions and are discussed below. ***Additionally, many requirements of Section 14-183 overlap state penal laws*** (Tx. Penal Code, Ch. 36, Bribery & Corrupt Influence) and the Mayor's Executive Order on gifts (E.O. 1-28). Section 14-183(f) authorizes department heads to adopt additional ethics rules within their departments. Each employee should inquire about and obtain a copy of any additional ethics rules within his or her department.

B. Chapter 15 (Contracts)

City employees may not have a direct or indirect interest in City contracts. (Houston City Code § 15-1) This provision is very similar to the provisions of Art. VII, § 4 of the Charter discussed above, which applies to "officers" of the City.

In the application of Section 15-1, it is important to distinguish which employees are "officers" because the Charter provisions that apply to officers are *more restrictive* than Section 15-1 which applies to all "employees," who may or may not also be "officers." If a person is ***both*** an employee and an officer, the more restrictive provisions apply.

The Legal Department has opined that Section 15-1 does not apply to community property interests at the subcontract level. However, an employee may be in violation of other applicable ethics provisions if a close relative acted as a subcontractor on a City job.

C. Chapter 18 (Ethics and Financial Disclosure)

Article I of Chapter 18 prescribes standards of conduct for "City officials," which is defined in Section 18-2 as including only the following:

- Elected city officials (Mayor, Council Members, City Controller);
- Department directors and other employees required to be confirmed by City Council;
- Assistant city attorneys;

- Persons holding executive level employee positions which are defined by Article Va, section 2(f) of the City Charter as those employees “whose duties require them to determine and publicly advocate substantive program policy, provide legal counsel, or to maintain a direct, confidential relationship with an appointive official of the city . . . or with an elected officer of the city (i.e., Council aides); or
- Appointed members of city boards, committees and commissions.

Prohibited Conduct

Section 18-3 contains a list of ethics standards that are essentially the same as those listed in Section 14-183(a). Violations of the provisions of Section 18-3 may be reviewed by the Ethics Committee. (Ch. 18, art. II.)

Financial Disclosure Statement

Financial disclosure statements must be filed by the Mayor and all Council Members, department heads, executive level staff members, and all attorneys in the Legal Department. (Ch. 18, art. III). The reporting and filing requirements were amended by the City Council in 2005.

Time for Filing

Under the 2005 amendments to Chapter 18, and for the report due in 2006 only, the required disclosure form must cover the period from ***October 1, 2004 through December 31, 2005 and must be filed no later than April 30, 2006.***

Financial disclosure reports for subsequent years must cover the preceding calendar year and be filed not later than April 30th of each succeeding calendar year.

Form of Report

The filing requirements in Chapter 18 applicable to the Mayor, Council Members and the City Controller were also amended to allow the financial disclosure statements filed by the Mayor and Council Members pursuant to Chapter 145 of the Local Government Code (discussed above) to satisfy the Chapter 18 filing requirement and to permit the City Controller to elect to file either the Chapter 145 form or the Chapter 18 form to satisfy the requirements of Chapter 18.

The reports are reviewed by the Ethics Committee. Common reporting errors include:

- Failure to provide all required data.
- Failure to indicate “not applicable” or “none” in those fields where there is no data to report.

- Premature completion or filing of the report.
- Failure to identify the location of real property in the real property listings required in the report.
- Failure to have the report properly notarized.

III. Administrative Policies and Executive Orders

The Mayor's Office has issued a number of Administrative Procedures and Executive Orders, available at www.choice.net. While most of these promulgations affect all City employees, the policies regulating gifts, the use of City vehicles, and travel on City business most often give rise to ethics inquiries.

Gifts

Executive Order 1-28 on gifts (Mayor's Gift Policy) is applicable to all employees, including department heads. ***Only elected officials are exempt.*** This policy prohibits employees from accepting anything of value from any person who is:

- Subject to City regulation (Permit and License holders, etc.).
- Under criminal investigation.
- Charged in a case pending in Municipal Court.
- Acting as a lobbyist or consultant representing others before the City.
- Holding or seeking City contracts or purchase orders.
- Making claims against the City.
- Otherwise in a position to benefit from City activity.

Exceptions are made for gifts from certain close relatives. An exception may also be made by an employee's department head for attendance at business and social functions ***if the sponsor is reimbursed*** for the cost of any food, lodging, transportation or entertainment provided.

The full text of the Mayor's Gift Policy should be reviewed by each employee to ensure that no unintended or inadvertent action results in a violation of its terms. This policy is far more restrictive in most respects than the corresponding provisions of the Penal Code, discussed above.

Motor Vehicles

Administrative Procedure 2-2 addresses Motor Vehicle Assignment and Use. This policy affects department heads and employees in a number of ways. Department heads are responsible for enforcing this policy with respect to their staff members, particularly as it may directly affect the following situations:

- Department heads and employees who are assigned take-home cars should make certain they have the required non-owned insurance rider for their take-home cars. Fire and Police personnel are exempt from this requirement.
- All employees are responsible for traffic citations and fines received while operating City vehicles.
- City vehicles, including Department heads' vehicles, are subject to the markings requirement under state Law, and applicable vehicles should be properly marked. Only vehicles used for law enforcement purposes are exempt. (Tex. Transp. Code, §§ 721.004 - 721.006)
- City-assigned vehicles are for City use only, and personal use is prohibited.

Travel

Travel authorization and reimbursement for travel expenses are set forth in Administrative Procedure 2-5. Department directors or their designees must approve travel, travel advances, and all travel-related expenses and reimbursements. All foreign travel must be approved by the Mayor or his designee. It is also advisable to remember that such reports are governmental records, open to public inspection by any person upon request under the Texas Public Information Act.

Rules governing travel expenses for City business travel of both salaried and non-salaried employees or elected officials are set forth in Section 2-31 of the Code.

Other Provisions

Possible traps for the unwary are the record keeping and reporting requirements of Sections 37-23 and 37-26 of the City Code. These sections require City employees who are in the "regulatory chain," as defined by Section 37-21, to make a permanent record of all communications, written or oral, with officers, owners, employees and other representatives of public utility companies over which the City exercises regulatory authority. The report is to be filed monthly with the Director of Finance and Administration. A form for the keeping of such records has been developed and should be reviewed if your job duties or position place you in the "regulatory chain."